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Filing date: **08/13/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059360
Party	Plaintiff Fitness Labs Nutrition Corp.
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Attachments	578-77-010 first amended petition to cancel 8-13-2014.pdf(138198 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 3,741,387

Mark: 

Owner: Alacer Corporation

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Nutrition Express Corp., a California Corporation,	)	Cancellation No. 92059360
	)	
Petitioner	)	
	)	
v.	)	
	)	
Alacer Corporation, a California Corporation	)	
	)	
Registrant	)	

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**FIRST AMENDED PETITION TO CANCEL**

BOX: TTAB FEE  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

To the Trademark Trial and Appeal Board:

Nutrition Express Corp. ("Petitioner") is or will be damaged by the continued registration of the mark  ("the PINK design") in Int'l Class 005 on the Supplemental Register, which is set forth in Reg. No. 3,741,387 ("the '387 Registration") and owned by Alacer Corporation ("Registrant"), and hereby requests cancellation of the same. Petitioner submits that this First Amended Petition to Cancel is proper under FRCP 15(a) and TBMP §§ 507.01(1)(B) and 512.04.

As grounds for cancellation, Petitioner, by its attorneys, avers as follows:

1. On July 16, 2009, Registrant applied to register the PINK design mark in IC 005 for "flavored vitamin drink mixes; vitamins and mineral supplements" ("the PINK goods") on the principal register. In response to an office action issued by the USPTO on October 23, 2009, Registrant amended its application to the supplemental register on November 17, 2009. The '387 Registration was issued on January 19, 2010.
2. On December 16, 1991, Petitioner's predecessor-in-interest McLind Corporation filed Application No. 77/782,504 for the mark PINK PACK in IC 005 for "vitamin, mineral and nutritional supplements." The PINK PACK mark was registered on November 10, 1992 as Reg. No. 1,730,605 ("the '605 Registration"). Petitioner and/or one of its predecessors-in-interest has used this mark continuously in interstate commerce since at least as early as 1979.
3. On information and belief, Registrant has not used the mark set forth in the '387 Registration prior to the date of first use listed on the '605 Registration. The '387 Registration's listed date of first use is over 15 years after the registration date of the '605 Registration.
4. The PINK PACK mark as embodied by the '605 Registration is symbolic of the goodwill and consumer recognition built up by Petitioner through time and effort in advertising and promotion.
5. Petitioner has developed extensive goodwill with respect to the PINK PACK mark.
6. Petitioner has spent significant sums in the advertisement and promotion of the goods sold in connection with the PINK PACK mark and those listed on the '605 Registration.
7. As a result of the advertisement and promotion of the PINK PACK mark, along with the high quality of the goods sold in connection with this mark, Petitioner has acquired a valuable reputation for the PINK PACK mark.

8. The dominant portion of the '605 Registration is the word "PINK." The PINK design contains only one word: "PINK."

9. The goods covered by the '605 Registration include "vitamin, mineral and nutritional supplements." The goods covered by the '387 Registration include "vitamins and mineral supplements." Almost identical goods are therefore covered by the two registrations.

10. Petitioner has been and will continue to be damaged by the issuance and existence of the '387 Registration in that confusion in the trade is likely to result from any current use of the PINK PACK mark and the PINK design mark, all to the great detriment of Petitioner, who has expended considerable sums and effort in promoting the PINK PACK mark.

11. Purchasers are likely to consider the goods of Registrant sold under the '387 Registration as emanating from Petitioner, and purchase such goods as those of Petitioner, resulting in loss of sales to Petitioner.

12. Concurrent use of the PINK PACK mark and the PINK design mark may result in irreparable damage to Petitioner's reputation and goodwill if the goods sold by Registrant are inferior, as purchasers are likely to attribute the source of Registrant's goods to Petitioner.

13. If Registrant is permitted to retain the '387 Registration sought to be cancelled, a cloud will be placed on Petitioner's rights in and to the PINK PACK mark and the '605 Registration.

WHEREFORE, Petitioner respectfully requests that Reg. No. 3,741,387 be cancelled and that this Petition to Cancel be sustained in favor of Petitioner.

Respectfully submitted,

KOPPEL PATRICK HEYBL & PHILPOTT

August 13, 2014

By

  
\_\_\_\_\_  
JAYE G. HEYBL  
Attorney for Petitioner

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805-373-0060

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**

**COUNTY OF VENTURA**

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2815 Townsgate Road, Suite 215, Westlake Village, CA 91361.

On August 13, 2014, I caused to be served the following document: FIRST AMENDED PETITION TO CANCEL on the above action by placing a true copy thereof enclosed in a sealed envelope addressed as follows.

Paul C. Llewellyn  
Kyle D. Gooch  
KAYE SCHOLER LLP  
425 Park Avenue  
New York, New York 10022  
Telephone: (212) 836-8000

**BY MAIL** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Westlake Village, California.

**BY FAX** I caused the attached document to be transmitted by facsimile transmission to the offices of the addressee at \_\_\_\_\_.


**BY FEDERAL EXPRESS** I caused such envelope to be deposited in a mailbox, substation, mail chute or other like facility regularly maintained by Federal Express for receipt of Federal Express packages, in a sealed envelope fully prepaid.

**BY PERSONAL SERVICE** I caused such envelope to be delivered by hand.

**FEDERAL** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

**E-MAIL** I caused the attached document to be transmitted by e-mail to the following e-mail address.

I declare under penalty of perjury, under the laws of the State of California and the United States of America, that the foregoing is true and correct, and that this proof of service was executed on August 13, 2014, at Westlake Village, California.

  
JENNIFER JIRKOVSKY